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Supreme Court of the United States

October Term, 1970

No. 493

WALTER JOSEPH COLLINS,
Petitioner,

—against—

UNITED STATES

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order vacating its denial of the petition for a writ of certiorari, entered on November 16, 1970, and granting the petition. As grounds for this motion, petitioner states the following:

1. *The Amendment of the Selective Service Regulations Removing the Requirement of Area Residency Makes It All the More Important That This Court Determine the Effect of Non-Residency Within the County and Exclusion of Negroes from Broad Membership Upon the Power of the Board.*

It is not disputed that the chairman of petitioner's local board at all times pertinent was not a resident of the county in which the local board had jurisdiction. (Pet. 67a-69a). Even the government has conceded that this violation of the requirements of 50 App. U.S.C. section 460(b)(3), posed a "more troublesome problem" than the violation of the requirements of 32 C.F.R. section 1604.52(c) relating to residency within the geographical area of the board's jurisdiction. On September 2, 1970, section 1604.52(c) was changed by Executive Order No. 11,555 to eliminate the requirement of area residency. That regulation now provides simply that:

> "The members of the local board shall be citizens, male or female, of the United States who shall be residents of a county in which their local board has jurisdiction. . ."

The government has, in other cases, apparently conceded that the statutory requirement is mandatory in nature. *United States v. Machado*, 306 F. Supp. 995, 997 (N.D.Cal. 1969). The Courts of Appeal for the Seventh and Eighth Circuits have indicated the same view, *Czepil v. Hershey*, 425 F.2d 251 (7th Cir., 1970), cert. denied, October 12, 1970 (No. 244, this Term), *Chaudron v. United States*, 425 F.2d 605 (8th Cir., 1970), cert. denied, October 12, 1970 (No. 5426, this Term), and the Sixth Circuit has held that all residence requirements are mandatory. *United States v. Cabbage*, 430 F2d 1037 (6th Cir., 1970). The repeal of the requirement of area residency makes it all the more important that this Court resolve the effect of violation of the mandatory statutory requirement of county residency.

It is the submission of the petitioner that a board

constituted in violation of the statute is a "lawless board" without the power to classify registrants or to issue valid orders to report for induction. *C.F. Oestereich v. Selective Service System Local Board,* 393 U.S. 236, 237 (1968). Where the government itself has failed to comply with the mandatory provisions of the federal law under which it has initiated criminal prosecutions, it should not be able to demand that young men comply with the same law, nor should it be able to invoke the aid of the courts in sentencing those young men to five years' imprisonment. Moreover, as a practical matter, to invalidate orders of induction issued by a board not constituted in accordance with the statute will not interfere with the operation of the Selective Service System in the same way as would the invalidation of orders due to non-compliance with the former requirement of area residency. There simply will not be as many instances of violation. But where such a violation does occur, the board is "infected with an alien presence" and is not the kind of board the President was directed to establish by section 460(b)(3). By no stretch of the imagination could it even qualify as a "de facto board." To condone such a violation by the Selective Service System of the law it is called upon to administer by Congress is shocking, and elementary principles of justice and fair play demand that the orders issued by an illegally-constituted board be refused enforcement in the courts.

Secondly, removal of the requirement of area residency may eliminate the only possible hope that boards serving areas predominantly Negro in population will contain Negroes in some proportion to their representation among the population of the area served. Admittedly the requirement of area residency has not proved particularly

successful in having Negroes placed on boards serving Negro areas. But with the elimination of that requirement, it becomes even easier to justify the exclusion of Negroes, since "coincidentally" the residents of the county chosen to serve on the boards will be white. The Court *must* face up to this question, particularly since it has now become easier to "legally justify" the exclusion of Negroes. It is submitted that there is something fundamentally wrong with a system by which Negroes are expected to give up their lives in military service while members of their race are excluded from membership on draft boards who make the selection of who shall serve—and who may die.

The removal of the requirement of area residency has made it all the more important that this Court pass on the other issues relating to board membership that are raised in the petition for certiorari, namely residency within the county as required by statute and the exclusion of Negroes from boards that serve areas predominantly Negro in population. For these reasons the denial of certiorari should be reconsidered so that these fundamental questions can be heard and resolved.

2. *The Contention That the Petitioner Was Dissuaded from Filing a Post-Induction Claim for Conscientious Objector Status Raises Important Questions Related to the Substantive Question Presented in Ehlert v. United States.*

In *Ehlert v. United States*, (422 F.2d 332 (9th Cir., 1970) (No. 120, this Term), this Court will presumably decide whether a local board is required to consider on the merits a claim for classification as a conscientious objector that has been made for the first time after an order to report for induction has been issued. If it decides that local boards must

hear such claims whenever a prima facie case for the classification has been established, it would be intolerable to allow a conviction to stand where a local board has had a policy against considering such claims and where pursuant to such policy, a registrant was advised that it would do him no good to file one.

The government has argued that the present petitioner "made no such claim and did not establish that he was in fact misled." (Brief for the United States, p. 9). The petitioner's reply to the brief in opposition, elaborating on his argument in this regard, may have reached the Court too late for consideration prior to its denial of certiorari. It is obvious that the main thrust of this case has been the improper composition of the local board, and on that basis certiorari may have been denied following the denial of certiorari in *Czepil v. Hershey* and *Chaudron v. United States*. However, the issue of misleading advice with respect to post-induction claims of conscientious objection should not be ignored and takes on greater significance in view of the grant of certiorari in *Ehlert*.

The government's contention that the petitioner did not establish that he was in fact misled is simply not borne out by the record. The uncontradicted testimony of the petitioner showed that he was advised by the clerk of the local board and by another official that it would do him no good to file the application for conscientious objector status because the board would not consider such claims after an order for induction had been issued. (Pet. 42a, 44a-45a). The government made no attempt to contradict this testimony in the District Court by calling the clerk of the board. There is nothing to indicate that the trial judge, who resolved the question against the petitioner in ruling on his motion to

dismiss, disbelieved the petitioner, since he held that the issue could not be raised on grounds of exhaustion-waiver. (Pet. 31a-33a). Although the petitioner testified as to these matters at trial, the issue was not before the jury, since the Court had previously ruled that the petitioner was foreclosed by principles of exhaustion-waiver from raising the issue. The Court of Appeals did not specifically discuss this issue in its opinion, and either rejected the contention on exhaustion-waiver grounds—which the government would concede to have been improper— or did not pass on it at all.

If this Court holds in *Ehlert* that boards must consider post-induction claims for classification as a conscientious objector, the policy of petitioner's local board in refusing to consider such claims would be manifestly improper. If, as petitioner contends, because of that policy he was advised that it would do him no good to file such a claim, and therefore, did not do so, his right to fair treatment from his board was clearly violated. See *e.g., United States v. Williams,* 429 F.2d 1340 (10th Cir., 1970).

The petitioner has asked that on this issue the judgment of the Court of Appeals affirming his conviction should be vacated, and the case remanded to that Court with directions to rule on his contention that he was dissuaded from filing a post-induction claim for conscientious objector status because of misleading advice given to him by employees of his local board. He has alleged that this advice was given because of a *policy* of the board precluding the consideration of such claims. If this Court holds in *Ehlert* that such claims must be considered, that policy would clearly be illegal and the advice given to petitioner on the basis of that policy necessarily misleading.

The uncontradicted testimony in the record shows that the petitioner was advised of such a policy and that because of such advice he was dissuaded from filing his post-induction claim. In the event that this Court holds in *Ehlert* that local boards must consider post-induction claims for conscientious objector status, petitioner's case should be remanded to the Court of Appeals with directions that it review his contention that his board had a policy of refusing to consider such claims and that he was so advised, as a result of which he failed to file his claim.

Conclusion

For the reasons set forth above, as well as those contained in the petition for certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order and grant the petition.

Respectively Submitted

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Certificate of Counsel

As counsel for the petitioner who has prepared this petition for rehearing, I hereby certify that this petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

ROBERT ALLEN SEDLER